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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~626~~ 26

HAROLD SHEPERD, GEORGE LEWIS and HERMAN BLOOMBERG, *Petitioners,*

v.

PEOPLE OF THE STATE OF NEW YORK

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Department

PETITIONER'S REPLY BRIEF

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Now that the *Ginzburg, Mishkin* and *Fanny Hill* cases have been decided, the questions presented by the Petition for a Writ of Certiorari herein need to be reassessed. Some of those questions have been resolved, particularly by the *Mishkin* decision. But others have

not, and their importance is such as to justify the granting of the Petition to adjudicate the recurring and difficult problems encompassed by those questions.

1. The Questions That Have Been Resolved by the Mishkin Decision.

The first two questions presented in the Petition for a Writ of Certiorari have been decided by the *Mishkin* opinion of the Court and thus are not appropriate for further consideration at this time. Those two questions relate (1) to the alleged vagueness of the "sadistic" and "masochistic" references in § 1141 of the New York Penal Law and (2) to the problem whether the type of publications involved can be considered obscene under any permissible or constitutional standard.

But the remaining three questions presented herein have in no way been resolved by the Court's actions in the *Ginzburg, Mishkin* or *Fanny Hill* cases. If anything, the appropriateness and need for full consideration of these three remaining questions have been augmented by those decisions.

2. The Question Whether Petitioners Have an Absolute Constitutional Right to a Jury Determination of the Obscenity Issues.

The Third Question presented in the Petition is whether the instant convictions "can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of any absolute right by the defendant to a trial and a determination by a jury of the alleged obscene, sadistic or masochistic nature of the book." That is a question unresolved by the recent Court decisions and that is a question now pending before this Court in the Petition in *Friedman* v. *New York*, No. 135, Oct. Term 1965.

The substantiality of this issue has been shown in the Petition (see pp. 24-25) by reference to the statements of Mr. Justice Brennan in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 448, and to those of Mr. Chief Justice Warren in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, 68-69, and in *Jacobellis* v. *Ohio,* 378 U.S. 184, 201 (joined by Mr. Justice Clark). And to those statements must be added the sentiments of Mr. Justice Stewart, uttered as a Circuit Judge in *Volanski* v. *United States,* 246 F. 2d 842, 845 (C.A. 6), wherein an obscenity conviction was reversed and remanded for a new trial "preferably by a jury"—since a jury in obscenity matters "most nearly satisfies the moral demands of the community" and can determine "the average conscience of the time." See full quotation in Petitioner's Reply Brief (p. 3) in *Friedman* v. *New York,* No. 135, Oct. Term 1965.

The significance of the right to a jury trial in obscenity matters is augmented to the extent that obscenity may now be said to depend upon "the circumstances of presentation and dissemination of material" (*Ginzburg,* p. 7). The degree and relevance of such particular "circumstances" are matters commonly within the ambit of jury competence, and as the *Ginzburg* doctrine of commercialized obscenity becomes more prevalent it becomes essential to know if there is a constitutional right to a jury determination of such matters.

It should be noted, finally, that the question of the federal constitutional right to a jury trial in obscenity misdemeanor prosecutions was promptly and properly raised at all stages of the proceedings below. No question is raised by the respondent as to petitioners' right to pursue this claim at this juncture. And in

view of the importance of the claim, the issue deserves full exploration by this Court.

3. The Question Whether the Convictions Are Constitutionally Invalid in the Absence of Any Allegation or Direct Proof of Scienter With Respect to Obscenity.

The Fourth Question presented by the Petition herein is whether the convictions of the petitioners "can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of allegation in the information as to knowledge or scienter as to the character of the book sold and in the absence of direct proof thereof or any definitive standard as to the degree of proof required."

While the *Mishkin* opinion dealt with the scienter problem, it did so only within the limits of the particular facts of that case. And those facts are critically different from those involved here. Mishkin himself was the active progenitor of, and participant in, a complex writing, publishing and selling enterprise, and scienter was found to have been established, after an extensive trial, by proof of "appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books." Slip opinion, pp. 9-10.

The facts in the instant cases could not be more significantly different. These petitioners were not the authors, the master minds, the distributors or the

publishers of the material in question. Petitioner Sheperd was simply the manager of a book store who took no part whatever in the actual sale of the books found to be obscene; there was no evidence that he even knew the transaction was taking place, much less that he knew or should have known of the obscene nature of the books. In short, Sheperd was convicted solely on proof that he was the manager of a book store wherein alleged obscene books were sold or offered for sale.

The proofs as to petitioners Lewis and Bloomberg were equally sparse. As clerks in a bookstore, they sold certain books and photographs later found to be obscene. While Bloomberg engaged in a bit of "puffing" of the material, neither was shown to have read or been aware of the nature of the particular items in question.

These cases thus bring into question the exact counterpart of the *Mishkin* scienter situation. Whereas *Mishkin* establishes one kind of proof of scienter necessary as to a publisher-distributor, what is the kind of scienter proof necessary as to a mere manager or clerk of a book store who has not been shown to have read or even to be in a position to know the contents of the publications? Here, then, as in the Petition pending in *Keney* v. *New York,* No. 39, Oct. Term 1965, a sharply substantial question is raised that affects all book store personnel in the country who work in stores that may have on their shelves materials found to be obscene. What must they do to protect themselves? What actions or inactions on their part will support a finding of scienter? Must they make themselves aware of the contents of all items offered for sale? These questions deserve most careful consideration by this

Court; and until they are answered, the book store business must be conducted on a most perilous basis.

Moreover, the instant Petition raises one aspect of the scienter problem which was expressly excepted from the *Mishkin* ruling. The Court's opinion, p. 9, fn. 11, noted that "The § 1141 counts [in the *Mishkin* case] did not allege appellant's knowledge of the character of the books, but appellant has not argued, below or here, that this omission renders the information constitutionally inadequate."

But the petitioners here urge precisely that point. At the trial court level, at the appellate level and in this Court (see Third Question presented), petitioners have argued that the informations were constitutionally defective in that they alleged only that petitioners "unlawfully" sold obscene publications, there being no allegation that they "knowingly" sold such publications. See discussion in Petition, pp. 30-31. The fact that the *Mishkin* opinion took pains to segregate out this point as to the adequacy of the information suggests that the issue is one of substance, warranting review by this Court.

4. The Question Whether the Convictions Can be Sustained Where Evidence Was Obtained Pursuant to a Massive Search and Seizure Plan Without Prior Judicial Authorization.

The Fifth Question presented by the Petition deals with the constitutional validity of the convictions, predicated as they were on evidence procured by a massive search and seizure scheme lacking prior judicial authorization. Respondent's only comment (Opposition Brief, p. 6) on this question was to seek to identify the issue with one then pending in *Mishkin* and to refer the Court to its *Mishkin* brief on the merits.

But this Court in *Mishkin* found that the record was inadequate with respect to the search and seizure point and declined to resolve the question there raised. No such defect is here present. A full hearing was held with respect to the search and seizure question and the Criminal Court rendered a seven-page opinion relative to the constitutional validity of the scheme. See Pet. App. 5a-11a.

Thus the search and seizure question raised in the Petition remains ripe and appropriate for the Court's consideration. For the reasons expressed in the Petition, pp. 31-34, the question should be explored by this Court. And see a somewhat similar search and seizure problem raised in the pending Petition in *Avansino* v. *New York,* No. 1008, Oct. Term 1965.

CONCLUSION

For these various reasons, in addition to those expressed in the Petition, certiorari should be granted as to all but the first two questions presented in the Petition.

Respectfully submitted,

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SHEPERD ET AL. *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE ~~DIVISION~~ TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 26. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate ~~Division~~ TERM of the Supreme Court of New York, First Judicial Department, is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE and MR. JUSTICE CLARK would affirm. *Mishkin* v. *New York*, 383 U. S. 502.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.